

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Petition for Declaratory Ruling:)	CC Docket No. 01-92
Lawfulness of Incumbent Local Exchange)	
Carrier Wireless Termination Tariffs)	

**REPLY COMMENTS OF THE
MONTANA LOCAL EXCHANGE CARRIERS**

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Summary

The Montana LECs oppose the Petition for Declaratory ruling filed by CMRS carriers including T-Mobile ("CMRS Carriers"). The weight of the comments submitted supports continuing to allow rural LECs to file tariffs with state commissions that set terms and conditions for traffic termination service. These terms and conditions (if approved by a state commission in a tariff case in which wireless carriers are free to fully participate) apply unless and until superseded by an approved interconnection agreement, following a request by a wireless carrier for negotiation of such an agreement. The Commission's 1996 Local Competition Order exempts wireless carriers from the duty to negotiate interconnection agreements, but wireless carriers, as noted by many commenters, have routed calls through RBOC tandems to rural LEC switches without contacting the rural LEC, identifying the traffic, or taking responsibility for paying for call termination services.

As described in these Reply Comments, the use of tariffs in this situation is supported both by post-1996 and pre-1996 Commission precedent, as well as by the decision of Congress to exempt rural LECs under Section 251(f)(1) from the duty to negotiate interconnection agreements under Section 251(c)(1). There is no provision of the Act which prohibits these types of state tariffs, and their lawfulness should be affirmed by the Commission.

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INDEPENDENT LOCAL EXCHANGE CARRIERS**

Pursuant to the Commission's Public Notice on September 30, 2002¹, the Montana Independent Local Exchange Carriers ("Montana LECs")² respectfully submit these Reply Comments regarding the Petition for Declaratory Ruling filed by T-Mobile, Western Wireless, and Nextel (hereafter "CMRS Carriers"). The Montana LECs are all rural independent local exchange carriers in Montana which terminate CMRS-originated traffic delivered through the facilities of Qwest (formerly U S West Communications), the Regional Bell Operating Company ("RBOC") serving Montana.

I. Introduction

¹ Comments Sought on Petitions for Declaratory Ruling Regarding Inter-carrier Compensation for Wireless Traffic, DA 02-2436, CC Docket No. 01-92 (rel. Sept. 30, 2002).

² The Montana rural LECs submitting these comments are: 3 Rivers Telephone Cooperative; Range Telephone Cooperative; InterBel Telephone Cooperative; Northern Telephone Cooperative; Ronan Telephone Company; Hot Springs Telephone Company; Lincoln Telephone Company; Blackfoot Telephone Cooperative; and, Clark Fork Telecommunications.

Neither the CMRS Carriers nor commenting parties supporting them provide satisfactory answers to the following questions:

(1) *If interconnection agreements are the "only" lawful way to establish terms and conditions for interconnection and exchange of traffic, then why did Congress through the rural exemption provision in Section 251(f)(1) excuse small rural LECs from the duty to negotiate interconnection agreements (a Section 251(c) duty) while still imposing on rural LECs the substantive interconnection / traffic exchange duties under Sections 251(a) and 251(b)?*

(2) *If (as the CMRS carriers advocate) the small rural LEC is precluded from using a tariff to set a default obligation to pay that applies until an interconnection agreement is in place, why would a CMRS carrier ever want to voluntarily negotiate an interconnection agreement, given that the CMRS carrier has the technical capability to instead send traffic through the RBOC tandem to the small rural LEC without ever contacting the rural LEC to make arrangements to pay for that traffic?*

(3) *How can CMRS carriers lawfully impose bill-and-keep as a "default" mechanism governing exchange of traffic between CMRS carriers and small rural LEC in the absence of a ruling by the state commission imposing bill-and-keep, since under Commission Rule 51.713 bill-and-keep can only be established by a state commission after finding, among other things, that traffic flow in both directions is balanced and expected to remain so?*

Should the Commission choose to consider the Petition of the CMRS Carriers on the merits, the answer to these questions requires denial of the Petition. If Congress really wanted interconnection agreements to be the only lawful means of satisfying interconnection and traffic exchange obligations, it would never have excused rural LECs from the duty to negotiate such agreements. *See* 47 U.S.C. §§ 251(c)(1) and 251(f)(1). Moreover, under Section 251(f)(1), state commissions have exclusive jurisdiction to decide whether to lift that exemption. In other recent proceedings, the Commission itself has explicitly recognized the option of meeting local competition duties through filing tariffs with state commissions, subject of course to such tariffs being superseded in an interconnection negotiation or arbitration.³

Nor could the Commission or Congress in declining to impose the duty to negotiate on CMRS carriers⁴ have intended that CMRS carriers (1) receive service while (2) refusing to make payment on the grounds that no interconnection agreement is in place.

Finally, while a CMRS carrier can always seek a state commission ruling imposing bill-and-keep in compliance with Section 51.713 of the Commission's rules, until the CMRS carrier initiates and prevails in such a proceeding, the CMRS carrier

³ See the discussion of the FCC's collocation provisioning orders at page 10 below.

⁴ By declaring that CMRS carriers are not local exchange carriers, the Commission in the 1996 Local Competition Order confirmed that CMRS carriers are not subject to the duties under Section 251(b) and (c), including the Section 251(c) duty to negotiate interconnection agreements. *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 11 FCC. Rcd. 15499, ¶ 1005 (1996) (judicial review history omitted) ("Local Competition Order").

has no right to unilaterally impose bill-and-keep on the small rural LEC. To the knowledge of the Montana LECs, the CMRS carriers have not shown even one instance in Montana where such traffic is roughly equal, and would therefore qualify for bill and keep under Section 51.713.

II. Standards for Entertaining Declaratory Ruling Requests

The opening round of comments also highlight that this case does not qualify for issuance of a declaratory ruling under the Commission's established standards for entertaining declaratory ruling requests.

First, even commenting parties *supporting* the CMRS Carriers correctly assert that this proceeding is a preemption case.⁵ This confirms the applicability of the special *ex parte* rule that mandates that the Petitioners serve their declaratory ruling petitions on the state public utility commissions whose tariff proceedings would be preempted if the petition is granted.⁶ Because the Petitioners have failed to comply with this rule, the Montana LECs filed a Motion to Dismiss on October 18, 2002.

Second, the comments supporting and opposing the CMRS carriers make conflicting factual statements. Because the formal complaint or rulemaking process is available to resolve factual disputes such as these, the Commission has historically reserved its declaratory ruling process for cases involving the clarification

⁵ See, e.g., Sprint Comments at 10, CTIA comments at 12.

⁶ See 47 C.F.R. §1.1206(a) Note 1.

of existing law as applied to undisputed facts.⁷ Factual disputes raised by the parties include the following:

- The CMRS carriers claim the rural LECs are refusing to negotiate; however, the evidence is that the CMRS carriers refuse to negotiate unless and until a tariff is in place requiring them to pay for service in the absence of an agreement.⁸
- The CMRS carriers claim that state tariffs are one-sided (or "unilateral") and do not provide for compensation to the CMRS carrier, when in fact tariff compensation to the CMRS carrier can be and in instances known to the Montana LECs is provided, just as tariffs can provide for other payments to parties utilizing the tariff such as is commonly done with interest and refund provisions.
- The parties dispute the procedures applicable in state tariff cases. The CMRS carriers argue that they are unfairly assigned the burden of proof of these cases when in fact the opposite is true. In Montana, as in most other states and as at the FCC, a state tariff proceeding is a "contested case" under the state Administrative Procedure Act with the carrier filing the tariff having the burden of proof.⁹

⁷ *In the matter of Access Charge Reform, Fifth Report and Order and further Notice of Proposed Rulemaking*, 14 FCC. Rcd. 14221, ¶¶ 187, 188 (1999), *affd.* 238 F.3d 449 (D.C. Cir. 2001).

⁸ *Compare* Cingular Wireless Comments at 6 *and* CMRS Carriers Petition at 7-8 *with* Oklahoma Rural Telephone Companies Comments at 4-5; Rural ILEC (South Dakota) Opposition at 5-6, Rural Iowa Independent Tel. Assn. Comments at 3-5; *and* Nebraska Rural Independent Companies Comments at 3-4.

⁹ Sprint and RCG/RTG incorrectly characterize, derogate and criticize state tariff proceedings (Sprint Comments at 8, RCG/RTG at 4). As set forth in Montana Code Sec. 69-3-303, and Secs. 2-4-601, et. seq., parties challenging tariffs have the right to full hearing, notice, and process. There can either be negotiations or a state commission decision after hearing. The burden of proof is not shifted as portrayed by Sprint, but instead, an ILEC filing proposed tariffs bears the burden of proving that its proposal is reasonable and supported by the facts and both federal and state law. *See Montana Power Co. v. Montana P.S.C.* 665 P.2d 1121 (Mont. 1983); U.S.C. §204(a)(1) (burden of proof on carrier submitting tariff).

Third, as shown by the opening rounds of comments, several state commission and court proceedings are already addressing the issues raised by the CMRS Carriers' Petition. The Missouri Commission proceeding, after much effort, has resulted in a final order that is now undergoing judicial review. The MoSTCG describes the extensive proceedings conducted in Missouri, and the full participation by the wireless carriers therein (MoSTCG Comments at 16). The Montana commission proceeding mentioned above settled after two years of proceedings and the settlement is now being implemented. The Nebraska commission has been actively considering a rural LEC tariff. (Nebraska Rural Independent Companies Comments at 4-5). For three years the Montana LECs have pursued a federal district court case against the RBOC (Qwest) that delivered wireless-originated traffic to them intermingled with other traffic. The Montana LECs in that litigation recently obtained a favorable Ninth Circuit ruling requiring that the district court construe their tariffs to determine if the RBOC is liable.¹⁰ Two other federal court cases on this issue are pending in Montana alone, which will now proceed with the guidance of the Ninth Circuit's decision.

Respect for the state commissions and courts conducting these ongoing proceedings counsel against the Commission accepting the invitation of the CMRS carriers to step in at this time through issuing a declaratory ruling. This is particularly so since the factual information needed to resolve these disputes, including the tariffs, invoices, and evidence regarding good or bad faith negotiations

¹⁰ *3 Rivers Tel. Coop., et. al. v. U.S. West Communication, Inc.* Case No. 01-35065, 2002 U.S. App. Lexis 18196 (9th Cir., Aug. 27, 2002).

between specific carriers, are before the state commissions and courts, but not this Commission. To the extent that the Commission desires to address issues relating to the Petition, it should do so on a prospective basis in a rulemaking such as CC Docket 01-92 (inter-carrier compensation), in which event there will be much less chance of interfering with other on-going proceedings (particularly those involving collection for services already rendered).

III. The Opening Round of Comments Support the Position of the Rural LECs

The weight of the comments ran strongly in favor of preserving the current system in which rural LECs can file tariffs that set default rules (including an obligation to pay) that apply until such time as an interconnection agreement is in place. However, several CMRS carriers and RBOCs inaccurately characterized Commission precedent in their comments, requiring a brief response.

A. The CMRS carriers do not possess the unilateral ability to impose "informal" bill-and-keep arrangements on the rural LECs

The comments of AT&T Wireless and U.S. Cellular suggest that informal bill-and-keep arrangements exist between CMRS carriers and rural LECs, and that that the small amount of traffic involved does not justify separate billing. (AT&T Wireless Comments at 3, U.S. Cellular Comments at 5). The facts do not bear this out. First, any agreement, however informal, requires consent from both sides. As should be clear from the number of rural LECs filing comments in this proceeding, the rural LECs known to the Montana LECs obviously have not and do not consent to bill-and-keep.

Second, the amount of traffic between CMRS carriers and rural LECs in most cases is large and growing, as the amount of wireless traffic has exploded in recent years. For example, the current amount in dispute in the *3 Rivers, et.al. v. Qwest* case in Montana, is currently over \$5 million, most of which is for wireless-originated traffic. Ronan Telephone company alone has seen an increase in this type of traffic of approximately 86% just in the first 10 months of 2002 (and of 167% since January 1, 1999), and other Montana LECs believe (the traffic is extremely difficult to measure) they are also experiencing substantial increases in incoming wireless traffic. The MoSTCG group in its comments points out that almost 14% of traffic (over 43 million minutes) is wireless-originated per year, for a group of 24 small Missouri companies.¹¹

¹¹ MoSTCG Comments at 26; see also, Frontier/Citizens Comments at 4 (Citizens

Third, Section 51.713 of the Commission's rules clearly sets forth the elements that must be satisfied as a prerequisite to a bill-and-keep system under the existing law (which is all that the CMRS Carriers can ask be construed in a declaratory ruling proceeding):

(i) "A state commission may impose bill-and-keep arrangements if the state commission determines"

(ii) " that the amount of telecommunications traffic from one network to the other is roughly balanced ... "

(iii) "and is expected to remain so"

(iv) "and no showing [that symmetrical rates are inappropriate] has been made pursuant to 51.711(b). "

47 C.F.R. Sec. 51.713(b) (numbering added). In the situation in which a CMRS carrier has not initiated a state proceeding of any kind (whether it be a challenge to a tariff, an arbitration, or a complaint), none of these elements are or can be met. In fact, because the traffic is in fact extremely unbalanced, with wireline-to-wireless traffic ratios in Montana ranging from 20%-80% to 30%-70%, the LEC would lose a significant amount of net revenues under bill and keep even if costs of termination were similar.

Bill and keep is inconsistent with the Act unless the following two conditions are met: 1) traffic must be roughly equal (See e.g. 47 C.F.R. §51.713), and 2) the costs to terminate on each network must be close to equal. Otherwise a bill and keep arrangement would violate 47 U.S.C. §201(b) (charges must be just and

Telecommunications of Minnesota terminates over 3,000,000 minutes of wireless traffic per month); and NTCA Comments at 8.

reasonable) and 47 U.S.C. § 252(d)(2)(A)(i) (rates based on costs to terminate on “each carrier’s network”).¹²

In addition, the rural LECs have a constitutional right to reasonable compensation for the use of their facilities, and a reasonable return on their investment,¹³ and this right is recognized in the Telecommunications Act.¹⁴ The continued provision of free service is constitutionally confiscatory. As one court explained:

an ILEC which has no such approved interconnection agreement is entitled to be compensated pursuant to its access tariff rates for any traffic terminated to it. This also comports with public policy, since otherwise ILECs would be forced to stand idle and allow carriers to terminate traffic for free.¹⁵

B. The Commission Did Not Outlaw Use of Tariffs to Implement CMRS/LEC Interconnection Arrangements Prior to 1996

In discussing the validity of tariff filings in its pre-1996 cellular interconnection proceedings, the FCC stated, “[t]he instant proceeding is not the appropriate forum in which to determine whether a particular tariff filing constitutes bad faith in negotiating. Rather, we will review specific factual disputes on a case-

¹² See also, NTCA Comments at 5-6.

¹³ See *Duquesne Light Co. v. Barash*, 488 U.S. 299, 307 (1989); *Tobacco River Power Co. v. Montana PSC*, 98 P.2d 886 (Mont. 1940).

¹⁴ See 47 U.S.C. § 252; see also MoSTCG Comments at 25-27.

¹⁵ *State of Missouri ex. rel Alma Telephone Company v. Missouri PSC*, Case No. 00CV323379, Findings of Fact, Conclusions of Law, Judgment, Decision and Order at 13-14 (Circuit Court of Cole County, Missouri, November 1, 2000). On further appeal, the Missouri Court of Appeals on a separate issue remanded the case to the Public Service Commission for further fact finding, 67 S.W.3d 545 (Mo. App. 2001). The Public Service Commission reaffirmed its prior ruling and the case is now back before the Circuit Court (Case No. 02CV324810).

by-case basis.”¹⁶ Moreover, the Commission later stated that “LEC costs associated with the provision of interconnection for interstate and intrastate cellular services are segregable and, therefore, we [the FCC] will not preempt state regulation of LEC intrastate interconnection rates applicable to cellular carriers at this time” (footnote omitted).¹⁷ Thus, while the Commission reserved the right to reject specific tariffs on a case by case basis following a successful complaint proving bad-faith actions by the LEC, it has in no way outlawed the use of tariffs to set terms for CMRS/LEC interconnection. In fact, state commissions approved many “radio common carrier” or other CMRS/LEC interconnection tariffs during these years.¹⁸

C. Nor has the Commission Outlawed the Use of Tariffs Since 1996

The Commission’s post-1996 decisions also do not forbid the filing of tariffs to establish terms and conditions of interconnection obligations, at least in the absence of any attempt to override an existing interconnection agreement. The Commission in the *Bell Atlantic v. Global NAPS* ruling cited by some commenting parties rejected an attempt by a wireline CLEC to trump its existing approved interconnection agreement with Bell Atlantic through subsequently filing a federal

¹⁶ *In the Matter of the Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services (Cellular Interconnection Proceeding)*, Memorandum Opinion and Order on Reconsideration, 4 FCC Rcd 2369, 2371, ¶ 15 (released March 15, 1989) (*Third Radio Common Carrier Order*) (“[w]e observe, though, that a landline company’s filing of a tariff before an interconnection agreement has been negotiated could indicate lack of good faith”) (emphasis added).

¹⁷ *In the Matter of Implementation of Section 3(n) and 332 of the Communications Act Regulatory Treatment of Mobile Services*, Second Report and Order, 9 FCC Rcd 1411, 1497-1498, ¶ 231 (released March 7, 1994).

¹⁸ A list of several pre-1996 State tariff proceedings is attached as an Appendix.

tariff.¹⁹ The Commission in doing so cited unlawfully ambiguous language in that tariff and suggested that the CLEC was trying to evade its obligations under the interconnection agreement.²⁰ The ruling in no way prevents the use of non-ambiguous tariffs to govern the terms and conditions of service provided before such time as an interconnection agreement is approved.²¹

In fact, the Commission just two years ago in its collocation docket recognized and encouraged the filing of tariffs at state commissions where doing so effectively implements local competition duties, in that case the duty to provide collocation under Section 251(c)(6):

In some instances, a state tariff sets forth the rates, terms, and conditions under which an incumbent LEC provides physical collocation to requesting carriers. An incumbent LEC also may have filed with the state commission a statement of generally available terms and conditions (SGAT) under which it offers to provide physical collocation to requesting carriers. Because of the critical importance of timely collocation provisioning, we conclude that, within 30 days after the effective date of this *Order*, the incumbent LEC must file with the state commission any amendments necessary to bring a tariff or SGAT into compliance with the national standards. At the time it files these amendments, the incumbent also must file its request, if any, that the state set intervals longer than the national standards as well as all supporting information. For a SGAT, the national standards shall take effect within 60 days after the amendment's filing except to the extent the state commission specifies other application processing or provisioning intervals for a particular type of

¹⁹ *Bell Atlantic v. Global NAPS*, 15 FCC Rcd 12946 (1999), *aff'd*, 247 F.3d 252 (D.C. Cir. 2001). See Verizon Wireless Comments, p. 4. The Iowa case also cited by Verizon Wireless (p. 4, note 10), *Iowa Network Services v. Qwest*, was decided on res judicata grounds rather than the merits.

²⁰ *Bell Atlantic v. Global NAPS*, 15 FCC Rcd. 12946, para.23.

²¹ The Missouri tariffs explicitly recognize that an interconnection agreement will take precedence over the tariff. See MoSTCG Comments at 15.

collocation arrangement, such as cageless collocation. Where a tariff must be amended to reflect the national standards, those standards shall take effect at the earliest time permissible under applicable state requirements.²²

As indicated by the quoted language, the Commission recognized that local exchange carriers might wish to use state tariffs to implement changes to the Commission's collocation rules involving the time intervals for provisioning collocation. This was fully consistent with federal court precedent upholding the right of state commissions to take actions that are neither explicitly authorized nor forbidden by the 1996 Act.²³

D. Section 332 Supports the Rural LECs

Commenting parties supporting the CMRS carriers curiously point to the following language in Section 332 of the Communications Act as somehow supporting the proposition that rural LECs may not file tariffs governing the terms and conditions of CMRS/LEC interconnection:

Upon reasonable request of any person providing commercial mobile service, the Commission shall order a common carrier to establish physical connections with such service pursuant to the provisions of Section 201 of this Act. Except to the extent that the Commission is required to respond to such a request, this subparagraph shall not be

²² See Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Act of 1996, *Order on Reconsideration*, 15 FCC Rcd 17806, 17826-27 (2000), *clarified*, Deployment of Wireline Services Offering Advanced Telecommunications Capability, *Memorandum Opinion and Order*, 16 FCC Rcd 3748 (2000).

²³ See *Illinois Bell Tel. Co. v. WorldCom Techs., Inc.*, 179 F.3d 566, *as amended*, 1999 U.S. App. LEXIS 20828, *15 *24 (7th Cir., 1999), *cert. dismissed*, 122 S.Ct. 1780 (2002) (noting the difference between (1) the absence of statutory language authorizing a state commission action and (2) the presence of statutory language prohibiting such action).

construed as a limitation or expansion of the Commission's authority to order interconnection pursuant to this Act.²⁴

This provision obviously contains no language forbidding the use of tariffs as a vehicle to implement interconnection ordered by the Commission pursuant to this provision. If the CMRS carriers are instead citing Section 332 as a potential jurisdictional source of authority that the Commission could (in their view) use as a basis to issue a new rule banning the use of tariffs, such citation is irrelevant because in a declaratory ruling proceeding all that can be done is clarify existing law. In any event, Section 332 is by its terms limited to "physical connections" and so appears to have no application to traffic that a CMRS carrier sends through a RBOC to a rural LEC.

Moreover, a CMRS carrier seeking to invoke rights under Section 332 must first make a "reasonable request" for interconnection. Rather than coming to the rural LECs and requesting interconnection (and offering to pay for call termination), the CMRS carriers are routing traffic surreptitiously through the RBOCs to rural LECs. Such action does not qualify as a "reasonable" request for interconnection and is in fact no "request" at all.

E. State Public Utility Laws Require the Filing of Tariffs

The duty of the rural LECs to comply with existing state law supports their decisions to file tariffs. In many and probably most states it is unlawful to provide intrastate telecommunications services without a tariff on file setting forth the terms and

²⁴ 47 U.S.C. Sec. 332(c)(1)(B) (emphasis added)

conditions of such service.²⁵ If the CMRS carrier chooses to initiate negotiations and an interconnection agreement is reached, such agreement will generally satisfy the state tariff filing obligation. But where no agreement exists, either because of the rural exemption applies or a CMRS carrier refuses to negotiate, filing a tariff remains essential to comply with these state laws.

Only an express provision in the 1996 Act could preempt the above-referenced state statutes that requires the filing of tariffs absent the existence of an approved interconnection agreement. The Act provides that “it shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments.”²⁶ No such express provision exists.

IV. The Commission Should Reject Attempts by Commenting Parties to Seek Further Declaratory Rulings Beyond the Scope of the Petitions Being Considered

Several commenting parties seeks to broaden these proceeding by seeking additional declaratory rulings and/or clarifications not sought by the CMRS Carriers or US LEC in their respective Petitions. These additional issues may or may not be addressed in the Notice of Proposed Rulemaking in CC Docket No. 01-92 on which the Commission has already taken comment. In any event, to keep the scope of this declaratory ruling proceeding within reasonable control, the Commission should

²⁵ See, e.g., Montana Code Sec. 69-3-305; Missouri Revised Statutes 392.220, 392.480; Kansas Statutes Ann. 66-109, 66-117, 66-1,190.

²⁶ P.L. 101-104, Title VI, Section 601(c) (see note to 47 U.S.C. Sec. 152). Other provisions of the Act expressly limit Federal authority to interstate services, preserving intrastate jurisdiction to the states. 47 U.S.C. Sec. 261(b) permits states to implement the 1996 Act in any way “not inconsistent” with the Act. See also 47 U.S.C. Sec. 152(b) and 201(a).

confine any ruling it does issue to the Petitions that have been filed under the Commission's declaratory ruling rule, 47 C.F.R. Sec. 1.2.

Parties seeking to broaden the issues include: AT&T (suggesting that the ruling on the Petition of the CMRS carriers be applied to landline-to-landline traffic as well as CMRS traffic – AT&T comments at 4, 17-20); Verizon Wireless (suggesting that the Commission issue various declarations regarding the proxy rule in 47 C.F.R. Sec. 51.71527 and 47 C.F.R. Secs. 20.11, 51-701, and 51-703 – Verizon Wireless Comments at 7-10); and Qwest and SBC (seeking a declaratory ruling excusing RBOCs from responsibility for traffic they deliver to rural LECs that even where “it may appear to the rural LEC that it is terminating a call for SBC rather than the wireless carrier”-- SBC comments at 2, 5-6, Qwest Comments at 15).

While all these requests go beyond the scope of the declaratory ruling proceeding, the Qwest request is also objectionable as a naked attempt at forum shopping. The issue of Qwest's responsibility to the pay charges under the Montana LEC's tariffs is currently pending before the U.S. District Court in Montana in litigation which has been ongoing for three years. Only two months ago the

²⁷ At page 7 of its Comments, Verizon Wireless cites Section 51.715 of the Commission's rules, which include a proxy rule (47 CFR Sec. 51.715(b)(3)) listing specific rates that in some circumstances arguably apply during the interim between a request for negotiation of an interconnection agreement and approval of the negotiated agreement. The Eighth Circuit, on remand from the Supreme Court, held that Commission was “judicially estopped” from enforcing the proxy rules, so it appears that this part of Section 51.715 is no longer enforceable and may at the time of the Court's ruling have already been vacated. *Iowa Utilities Board, v. FCC*, 219 F.3d 744 (8th Cir. 2000) (“[w]e agree with the petitioners that the respondents are estopped from trying to now revive the proxy prices.”)

Ninth Circuit remanded the case and directed the district court to analyze the tariffs of the Montana LECs to evaluate Qwest's liability under those tariffs.²⁸ This Commission should reject Qwest's attempt at forum shopping so close upon the heels of the 9th Circuit's decision adverse to Qwest.

²⁸ See *3 Rivers Tel. Coop. et. al. v. U.S. West Communications*, Case No. 01-35065, 2002 U.S. App. Lexis 18196 (9th Cir., Aug. 27, 2002).

Conclusion

For the reasons stated above and in their opening comments, the Montana LECs respectfully request that this Commission grant the declaratory ruling requested by US LEC and deny the declaratory ruling requested by the CMRS Carriers.

Respectfully submitted

The Montana Local Exchange Carriers

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Dated: November 1, 2002

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APPENDIX

Citations for Pre-1996 State Tariff Orders

Application of the Southern New England Telephone Company to Amend its Rates and Rate Structure, Docket No. 92-09-19, Connecticut Department of Public Utility Control (July 7, 1993) (ordering the filing of a generic wireless tariff).

In the Matter of the Protest by Gary Cellular Telephone Company of Indiana Bell Telephone Company, Incorporated's Filing for Cellular Mobile Carrier Service, Cause No. 38122, Indiana Utility Regulatory Commission (March 30, 1989) (approving the use of a tariff by the local exchange carrier to provide interconnection to cellular carriers).

In the Matter of Indiana Bell Telephone Company, Inc. to Treat Radio Common Carriers and Cellular Mobile Carriers Under a Unified Tariff, Cause No. 38235, Indiana Regulatory Commission (February 1, 1989) (determining that interconnection arrangements be governed by a tariff rather than contracts).

In re: Investigation into the inter-connection of mobile carriers with facilities of local exchange companies, 89-8 FPSC 104, Docket No. 870675-TL; Order No. 21673, Florida Public Service Commission (approving tariffs as being in compliance with a previous order and clarifying that the tariff rates apply to all mobile carriers services).

Investigation on the Commission's own motion into the regulation of cellular radiotelephone utilities; and Related Matter, 54 CPUC2d330, Decision No. 94-04-085, Investigation No. 88-11-040, Application No. 87-02-017, California Public Utilities Commission (April 20, 1994) (approving the use of interconnection tariffs rather than individual contracts between cellular carriers and local exchange carriers);

CERTIFICATE OF SERVICE

I, Monica Gibson-Moore, hereby certify that on November 1, 2002, I caused copies of the foregoing Comments electronically filed with the FCC to be served on the following via hand delivery:

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